Petition

81-1652

No.

Office - Supreme Court, U.S.
FILED
MAR 5 1982
ALEXANDER L. STEVAS,
CLERK

In the
Supreme Court of the United States
OCTOBER TERM, 1981

M. DAVID RIDEN,

Petitioner,

vs.

UNITED STATES NUCLEAR REGULATORY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1) Whether Petitioner was denied due process where the presiding agency official at the pre-termination hearing was not impartial having considered previously adjudicated disciplinary action involving the Petitioner which was not the subject of the instant hearing and which was not referred to in the notice of proposed adverse action?

2) Whether Petitioner was denied due process where the presiding agency official at the pre-termination hearing did not fully consider his oral reply?

3) Whether Petitioner's dismissal was supported by substantial evidence, where the agency failed to prove a critical part of the case against Petitioner, and the burden of disproving that evidence was placed on the Petitioner.[1]

---

[1] The parties to this action are the Petitioner, M. David Riden and the Respondent, the United States Nuclear Regulatory Commission. Though the action involves review of a final order of the Merit Systems Protection Board, the United States Nuclear Regulatory Commission is the named respondent, pursuant to 5 U.S.C. §7703 (a)(2).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

OPINION BELOW

The opinion and judgment of the United States Court of Appeals, Seventh Circuit, in Case No. 80-2793 were entered on January 8, 1982; copies of the opinion and judgment are attached hereto as Appendix A and Appendix E, respectively. The opinion of the Court of Appeals is unpublished.

JURISDICTION

The opinion and judgment of the United States Court of Appeals, Seventh Circuit, were rendered and entered on January 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

United States Constitution

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes

5 U.S.C. §7513:

> (a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.
>
> (b) An employee against whom an action is proposed is entitled to—
>
> (1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;
>
> (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
>
> (3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

5 U.S.C. §7703(c):

(c) In any case filed in the United States Court of Claims or a United States court of appeals, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

Regulations

5 C.F.R. §752.404(c)(2)

> (2) The agency shall designate an official to hear the employee's oral answer who has authority either to make or recommend a final decision on the proposed adverse action. The right to answer orally in person does not include the right to a formal hearing with examination of witnesses unless the agency provides one in its regulations in accordance with paragraph (g) of this section.

5 C.F.R. §752.404(e)

> (e) *Representation.* 5 U.S.C. §7513(b)(3) provides that an employee covered by this part is entitled to be represented by an attorney or other representative. An agency may disallow as an employee's representative an individual whose activities as representative would cause a conflict of interest or position; or an employee of the agency whose release from his or her official position would give rise to unreasonable costs or whose priority work assignments preclude his or her release. 5 U.S.C. §7114 (a)(5) and the terms of any applicable collective bargaining agreement govern representation for employees in an exclusive bargaining unit.

STATEMENT OF THE CASE

Petitioner, M. DAVID RIDEN, was a Reactor Inspector with the United States Nuclear Regulatory Commission (hereinafter referred to as the NRC), Office of Inspection and Enforcement, Region III, Glen Ellyn, Illinois. By letter dated August 21, 1979, Mr. Robert F. Heishman, Chief of Reactor Operations and Nuclear Support Branch, NRC, proposed Riden's removal from his position to promote the efficiency of the service (R. PT. I, 8-10, PT. II, 293-295). At the time his dismissal was

proposed, Petitioner was a non-probationary employee. Prior to the institution of disciplinary action, Petitioner had an unblemished background. Petitioner held a secret security clearance and was an ordained Deacon of the Presbyterian Church. While with the NRC, he had successfully completed regional orientation and the education required by numerous study guides. The basis for the proposed action was the NRC's belief that Riden had altered the original of the Control Room Operations (CRO) portion of the Pressurized Water Reactor (PWR) Technology Training Course by changing the answers in numbers 4 and 11 (R. Pt. I, 8-10; PT. II, 293-295). As a part of his training to become a resident inspector, Riden had taken a series of three PWR Technology exams, including the CRO exam. It is undisputed that Riden received a passing grade on the CRO exam (R. PT. III, 54-55; PT. IV, 276).

On February 1, 1979, Riden received the originals of all three PWR exams with a memorandum indicating that he had failed the course (R. PT. I, 158-159; PT. II, 296-297).

Riden was shocked upon receiving notification that he had failed the course, since he had previously been informed that he had passed the course (R. PT. I, 159, 197-198; PT. III, 110; PT. IV, 280-281). Upon reviewing the materials, Riden noticed what he perceived as a grading error on his CRO exam (PT. I, 160; PT. IV, 283). His score had been recorded as 9/12, but Riden believed that he had not been credited for correct answers on numbers 4 and 11, meaning his score should have been 11/12 (R. PT. I, 160).

Riden notified William Little, his immediate supervisor, of the grading error on February 1, 1979, within fifteen

to twenty minutes after he received the examinations (R. PT. I, 159, 162, PT. III, 111, PT. IV, 284).

On February 12, 1979, Little contacted Steven K. Showe, the Chief of the PWR Technology Section and the grader of Riden's exam, by telephone with respect to the grading errors on Riden's CRO exam. Showe indicated that he could not find a photocopy of the exam and requested that the original exam be sent to him for review (R. PT. I, 184; PT. II, 298-299; PT. III, 61, 112, PT. IV, 288). Riden had obtained a passing grade on the CRO exam and accordingly, it was normal procedure that a photocopy was not made nor retained in the grader's files (R. PT. III, 63-64, 93; PT. IV, 220-221). Upon receipt of the original exam, however, Showe was able to locate a purported photocopy of the CRO exam (R. PT. I, 184; PT. III, 63; PT. IV, 289). Showe could not explain precisely how it happened that the purported copy was made, and the individual who made the photocopy was never identified. (R. PT. III, 89-90).

Showe's comparison revealed that the original examination paper differed from the purported photocopy in that it contained different answers in numbers 4 and 11 (R. PT. III, 66-77). Showe believed that red check marks had been added to the original opposite the answers to numbers 4 and 11, indicating that the answers to those questions were correct.

Showe's normal practice when grading an examination was to place a red check mark adjacent to a correct answer (R. PT. I, 139-140) and to write in the correct answer when an answer was wrong. (R. PT. III, 88). This was not done on numbers 4 and 11 of the original examination (R. PT. III, 91).

An investigation was initiated by the Office of Inspection and Auditor (OIA) (R. PT. V, II, 574-576). The OIA submitted the original CRO exam and the purported copy, together with known writing samples of Riden, to the FBI laboratory for analysis (R. PT. I, 109-138; PT. II, 546-547; PT. IV, 257-258). The examination determined that Riden was the author of the original examination; that the photocopy appeared to be a photocopy of the original examination except for certain differences in the text of numbers 4 and 11; that there were abrasions on the original indicative of erasures extending over the areas where there was a difference between the original and the photocopy; and that there were differences in the red ink check marks that appeared on numbers 4 and 11 and the red check marks on the remainder of the exam (R. PT. II, 546-547; PT. IV, 259, 262, 263). The examiner was unable to state that the handwriting in the disputed areas of numbers 4 and 11 of the photocopy was Riden's (R. PT. III, 4; PT. IV, 269). Likewise, the examiner could not preclude the possibility that the handwriting in those disputed areas of the photocopy was someone else's (R. PT. IV, 273-274). There were also erasures on other parts of the CRO examination, specifically, numbers 12 and 11 (R. PT. IV, 305).

Based upon the OIA report, Riden's dismissal was proposed (R. PT. II, 8-10, 57-138). On September 18, 1979, Riden was provided an opportunity for an oral reply to the charge before James G. Keppler, Director, NRC, Region III (R. PT. IV, 199). Riden denied that he falsified the exam and stated that the purported photocopy was a falsified document manufactured in an effort to prevent him from becoming the Resident Inspector at David-Besse. During the course of the oral reply, Keppler discus-

sed at great length a prior incident in which Riden had been involved and in which Keppler served as the adjudicating officer (R. PT. I, 148). There had been no mention of this incident in the notice Riden received of the charge against him (R. PT. I, 146). This prior incident involved the alleged copying of training exam questions in July of 1978 (R. PT. I, 146-147). As a result of the earlier incident, a letter of admonition authored by Keppler was placed in Riden's file (R. PT. I, 148-149). Riden was not advised of his grievance or appeal rights with respect to this earlier disciplinary action (R. PT. I, 149-150, 151). Riden has vehemently denied any wrongdoing in this earlier incident. Save for Petitioner's denial of any wrongdoing, Keppler indicated that he considered much of Petitioner's oral reply to be irrelevant (R. PT. I, 4, 248, 251; PT. IV, 200). Thereafter, Riden's attorney requested that Keppler remove himself from the case, but Keppler declined to do so (R. PT. I, 250-251; PT. II, 307-308). After the conclusion of the oral reply proceeding, this request was renewed in writing, but once again without success (R. PT. II, 307-308). On October 30, 1979, Riden was notified by Keppler that Mr. Heishman's action of August 20, 1979 proposing his removal was sustained (PT. I, 6). Thereafter, pursuant to 5 U.S.C. §7513(d), a timely notice of appeal to the Merit Systems Protection Board (hereinafter referred to as the MSPB) was filed (R. PT. I, 2-3).

On August 15, 1980, a hearing was held before the MSPB, Stephen Manrose presiding. Testimony in accordance with the foregoing was introduced. The MSPB affirmed the action of the NRC in dismissing Riden, holding the dismissal was supported by a preponderance of the evidence (R. PT. II, 596-600). The Board specifically

rejected Riden's claim that Keppler, the oral reply official, did not fully consider Riden's oral reply, holding that there was no particular statutory mandate as to what evidence must be considered (R. PT. II, 596-600).

Upon rejection of Riden's motion for reconsideration, Petitioner filed a timely notice of appeal to the United States Court of Appeals, Seventh Circuit, pursuant to 5 U.S.C., §7703, providing for review of final orders or decisions of the MSPB. Before the Court of Appeals, Riden argued:

(1) He was denied due process when the NRC considered reasons beyond those specified in the notice of proposed action,

(2) He was denied a fair opportunity for an oral reply when the agency official was not impartial,

(3) His dismissal was not supported by substantial evidence,

(4) The penalty of dismissal was an abuse of discretion.

On January 8, 1982, the Seventh Circuit rendered an unpublished order in accordance with Circuit Rule 25, rejecting Riden's arguments and affirming the action of the MSPB in dismissing Riden.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION IS OF IMPORTANCE TO OTHER NON-PROBATIONARY EMPLOYEES AS IT WILL DETERMINE THEIR RIGHT TO A PRE-TERMINATION HEARING BEFORE AN IMPARTIAL AGENCY OFFICIAL.

Petitioner argued below that he had been denied due process in that he was not provided an impartial agency official at his oral reply hearing. *See Shelton* v. *EEOC*, 357 F.Supp. 3 (W.D. Wash. 1973) affirmed, 416 U.S. 976 (1974); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974) (White, J. concurring in part and dissenting in part). Specifically, Petitioner alleged that the hearing officer was not impartial because the official had knowledge of and had in fact adjudicated a prior disciplinary action involving the Petitioner, which action was not referred to in the notice of proposed adverse action. Likewise, Petitioner argued that his oral reply was not considered in arriving at the agency's termination decision and further indicated the hearing officers lack of impartiality because the hearing officer termed much of it "irrelevant." The Court of of Appeals rejected these contentions, saying, "Whatever Riden's right to a hearing before an impartial agency official, we do not agree that [the hearing officer's] involvement in this earlier incident rendered him incompetent. [The hearing officer] simply presided over and adjudicated a wholly separate disciplinary charge that we have noted, was in no way relied on or considered in reaching the decision to dismiss Riden . . ." Opinion, Appendix A at 8a.

In accordance with 5 U.S.C. §7513(b)(2) (Supp. III 1979) and 5 C.F.R., § 752.404(c), Petitioner had a right to a pre-termination oral reply hearing. Specifically, 5 C.F.R. § 752.404(c) provides in pertinent part, ". . . The agency shall designate an official to hear the employee's oral answer who has authority either to make or recommend a final decision on the proposed adverse action". Neither the statutory scheme nor Court decision has adequately delineated whether or to what extent a designated agency official must be impartial.

In *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), this Court had before it the constitutionality of the Lloyd-LaFollette Act, the predecessor of the present statutory scheme regulating the retention and dismissal of non-probationary federal employees. In its decision, this Court did not definitively determine whether a pre-termination hearing before an "impartial agency official" was mandated or what facts and circumstances would determine an official's impartiality. Mr. Justice Rehnquist, joined by the Chief Justice and Mr. Justice Stewart, found an impartial agency official at a pre-termination hearing unnecessary. 416 U.S. at 155n.12. On the other hand, Mr. Justice White wrote that "the right to an impartial decision maker is required by due process". 416 U.S. at 197-198.

Congress in enacting the Civil Service Reform Act sought to codify the due process requirements enunciated in *Arnett* v. *Kennedy*, but remained silent as to the requisites of the agency official. S. Rep. No. 95-969 95th Cong. 2nd Sess (1978). However, Congress did extend to non-probationary employees important new procedural rights, including the right to be represented by an attorney at the pre-decision stage. 5 U.S.C. §7543(b)(3) (Supp. III 1979); 5 C.F.R. §752.404(e). Within this context, it may

also be inferred that Congress intended to provide an impartial decision maker. In the context of administrative proceedings, this Court has held that an impartial decision maker is essential. *Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970). Further, to comport with due process the individual decision maker must not have exhibited bias to the factual questions to be decided at the hearing. *Staton* v. *Mayes*, 552 F.2d 908, 914 (10th Cir. 1977) *cert. denied* 434 U.S. 907 (1977).

Petitioner submits that he was denied due process where he was not provided an oral reply before an impartial agency official and that certiorari should be granted in this case to determine whether the Civil Service Reform Act mandates a pre-termination hearing before an impartial agency official and to enunciate the criteria for determining when an agency official is impartial.

II.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH 5 U.S.C., §7703 AND THE DECISIONS OF OTHER CIRCUITS. THE COURT SHOULD GRANT CERTIORARI TO FINALLY SETTLE THE STANDARD OF REVIEW OF AGENCY DECISIONS UNDER 5 U.S.C., §7703.

In upholding the action of the MSPB, the Seventh Circuit Court of Appeals failed to ascertain the correct standard for review of MSPB decisions. Prior to the effective date of 5 U.S.C. §7703 (Supp. III 1979), the Seventh Circuit applied a rational basis standard in determining whether to uphold agency dismissal orders.

The Seventh Circuit, in government employee discharges, usually limited the scope of review to insuring that the proper procedures were followed and that the discharge was not arbitrary and capricious. An agency discharge

decision was not arbitrary or capricious where the record showed a rational basis for the action. *Ringquist* v. *Hampton,* 582 F.2d 1138 (7th Cir., 1978) *cert. denied* 440 U.S. 907 (1979); *Young* v. *Hampton,* 568 F.2d 1253 (7th Cir., 1977); *Wroblaski* v. *Hampton,* 528 F.2d 852 (7th Cir., 1976); *Wood* v. *U.S. Post Office Department,* 472 F.2d 96 (7th Cir.), *cert. denied,* 412 U.S. 939 (1973).

Riden argued that in accordance with the Civil Service Reform Act of 1978, which abolished the Civil Service Commission and created the MSPB, the Circuit Court was bound to set aside agency actions, ". . . unsupported by substantial evidence". 5 U.S.C. §7703(c)(3) (Supp. III 1979). The NRC had argued that the Circuit Court should continue to apply the less rigorous rational basis standard in reviewing agency decisions.

The Circuit Court failed to definitely ascertain the current standard for review, saying:

> "There appears to be some disagreement between the parties as to the proper standard of review in the instant case. The NRC relies on decisions of this court determining that the agency dismissal orders will be upheld if there is a rational basis to support them. (Citations Omitted) Riden points out, however, that these cases were decided before the effective date of § 7703(c)(3), which, as indicated, provides for reversal of agency decisions that are unsupported by substantial evidence. For the purpose of this petition for review, we will assume that the substantial evidence standard applies. Because we hold that the Board's decision is supported by substantial evidence, a *fortiori* the more lenient rational basis standard is also satisfied. Opinion, Appendix A at 10a, n.11

In *Rinquist* v. *Hampton,* decided some four years before the decision in this case, the Seventh Circuit Court of Appeals had before it the review of the action of the

Internal Revenue Service in terminating Rinquist from his position as an auditor. Rinquist, like Riden, challenged the Court's application of the rational basis standard and argued that the Court should set aside agency actions unsupported by substantial evidence. After consideration and discussion, the Court rejected application of the substantial evidence standard, saying, "We therefore adhere to the standard enunciated in our prior decisions: reinstatement of a government employee will be ordered only where the discharge is not supported by any rational basis." 582 F.2d at 1140; *See also Young* v. *Hampton,* 568 F.2d 1253 (7th Cir., 1977).

Insofar as the Court failed to overrule its earlier cases applying the rational basis analysis to agency decisions, the Circuit Court's decision is in conflict with the decision of the Court of Claims in *Brewer* v. *United States Postal Service,* 647 F.2d 1093 (Ct. Cl. 1981) and the decision of the Second Circuit in *Rotolo* v. *Merit Systems Protection Board,* 636 F.2d 6 (2nd Cir. 1980). Both the *Brewer* and Rotolo courts held that they were constrained to apply the substantial evidence standard to the review of agency termination decisions. Specifically, the *Brewer* court said:

> This case is the first review by this Court of a decision of the Merit Systems Protection Board under the Civil Service Reform Act of 1978, Pub. No. 95-454, 92 Stat. 1111 (1978) (codified in scattered sections of 5, 10, 15, 28, 31, 38, 39 and 42 U.S.C.). That Act directs the Court of Claims to:
>
> * * * review the record and hold unlawful and set aside any agency action, findings or conclusions found to be:
>
> (1) arbitrary, capricious, an abuse of discrecretion or otherwise not in accordance with law;
>
> (2) obtained without procedures required by law, rule or regulation having been followed; or

(3) unsupported by substantial evidence • • •
[5 U.S.C. § 7703(c) (Supp. III 1979).]

Thus, there is confusion between the Court of Claims, the Second Circuit and the Seventh Circuit with respect to the present standard for review of agency decisions. Supreme Court Rule 17 provides for review on certiorari, "when a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals in the same matter . . ." The Petitioner submits that certiorari should be granted to resolve this conflict and to definitively establish the standard for review of MSPB decisions.

III.

THE COURT OF APPEALS INCORRECTLY CONSTRUED AND APPLIED 5 U.S.C. §7703(c) BY PLACING THE BURDEN OF PROOF ON THE PETITIONER.

Petitioner, as a federal non-probationary employee, had a proprietary interest and expectancy of employment which could not be divested without compliance with the statutory mandate. *Arnett* v. *Kennedy,* 416 U.S. 134, 151 (1974). In agency discharge proceedings, the burden of proof is clearly on the agency. *Weinberg* v. *Macy,* 360 F.2d 816 (D.C. Cir. 1965); *Ford* v. *U.S. Department of Housing,* 450 F.Supp. 559 (N.D. Ill. 1978); *See Also, Board of Regents* v. *Roth,* 408 U.S. 564 (1972). This is consistent with the provisions of 5 U.S.C., Sec. 7703(c) (Supp. III 1979) which provides the ". . . court shall review the record and hold unlawful and set aside agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule or regulation having been followed; or

(3) unsupported by substantial evidence . . ."

Thus, the court reviewing the agency action is charged with reviewing the administrative record to determine whether the agency has discharged its burden of proof.

In the instant case, the only arguably direct evidence of Petitioner's guilt was the existence of the purported photocopy of the CRO examination. The manner in which the photocopy was made, the person or persons who made it, the person or persons who had its care, custody and control have never been identified or explained. Petitioner specifically challenged the total lack of evidence relating to the manner and method of making the photocopy and the failure to eliict a chain of custody. The Circuit court noted the MSPB's "failure to establish a wholly reliable and complete chain of custody for the photocopy", but placed the burden on the Petitioner to provide "evidence that the photocopy was mishandled or doctored". Opinion, Appendix A at 11a.

This shifting of the burden to Petitioner was not in accordance with the statutory scheme and court decisions which clearly place the burden of proof on the agency. Accordingly, certiorari should be granted.

CONCLUSION

For the above and foregoing reasons, a writ of certiorari ought to issue to review the judgment of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued October 29, 1981)

January 8, 1982

Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

DAVID RIDEN,

Petitioner,

vs.

UNITED STATES NUCLEAR REGULATORY COMMISSION,

Respondent.

No. 80-2793

On Petition for Review of an Order of the United States Merit Systems Protection Board.

ORDER

This is a petition for review of an order of the Merit Systems Protection Board (the "Board") sustaining a decision by the Nuclear Regulatory Commission (the "NRC") to dismiss the petitioner, M. David Riden, one

* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

of the agency's reactor inspectors. The NRC found that Riden, a candidate for assignment as a resident reactor inspector, falsified the results of a training examination in order to obtain a passing grade in a course required for the assignment. The NRC found that Riden's removal was necessary to "promote the efficiency of the service." 5 U.S.C. § 7513(a) (Supp. III 1979). After Riden exercised his right of appeal to the Board, 5 U.S.C. § 7513 (d) (Supp. III 1979), the Board ruled that the dismissal was supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B) (Supp. III 1979).

Riden now seeks review in this court pursuant to 5 U.S.C. § 7703 (Supp. III 1979). He contends that the Board's decision must be overturned because his procedural rights were violated, because the decision was not supported by substantial evidence, and because, in any event, the penalty of discharge was grossly disproportionate to the offense charged. We find each of these contentions to be without merit and, therefore, affirm the decision of the Board.

I.

Prior to his dismissal from the agency, Riden was employed as a regional reactor inspector with the NRC at its Office of Inspection and Enforcement, Division III, located in Glenn Ellyn, Illinois. This office coordinates and conducts inspections of nuclear reactors to ensure compliance with applicable laws and regulations.

In September 1978, Riden was enrolled in the Pressurized Water Reactor Technology Training Course, which was an integral part of the training program for candidates seeking appointment as resident reactor inspectors.[1] To obtain a passing grade in the course, a stu-

[1] The duties of a resident reactor inspector are similar to those of a regional inspector, except that a resident inspector is assigned permanently to a particular nuclear reactor and becomes the primary NRC representative at the facility.

dent was required to achieve a weighted average score of 70 based on three separately graded examinations. Riden received scores of 60 and 64 on the first two tests.[2] On the third examination, relating to the Control Room Operations ("CRO") portion of the course, Riden received a passing score of 75, answering 9 out of 12 questions correctly. This score was not high enough, however, to raise his weighted average to a passing score for the entire training course.

Riden was notified on February 1, 1979, that he had not passed the course and was provided with the original copies of the course examinations.[3] Upon inspection of the originals, Riden discovered what he asserted to be a grading error on the CRO examination. It appeared that correct responses to questions 4 and 11 had not been credited and hence the score on his examination should have been increased.

Riden believed at that time that had he been credited with 11 correct answers on the CRO test, he would have achieved a passing grade for the course. R. I at 85; R. IV at 313-15.[4] Accordingly, he brought the alleged grading error to the attention of his supervisor, William Little.[5] On Riden's behalf, Little contacted Steven K. Showe,

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[2] Riden was given an opportunity to take a makeup examination covering the subjects of the first two examinations. Because his score on the makeup test, 54, would not have increased his overall average, the makeup examination was not used in calculating a final grade for the course.

[3] Riden was not given the original copy of the makeup test that he had taken, *see supra* note 2, the score on which had no bearing on his course grade.

[4] This belief was mistaken. Riden would not have passed the course even had he been credited with correct answers to the disputed questions. R. III at 77.

[5] There was a conflict in testimony regarding the date on which Riden communicated the alleged grading error to Little. Riden testified that he apprised Little of the error on February 1, 1979, the same day that the examina-

Chief of the PWR Technology Section in the Career Management Branch of the NRC headquarters, training division, about the alleged grading errors, and also forwarded to Showe the original copy of the CRO examination. Showe was the official who had graded that examination.

A photocopy of Riden's CRO examination had been retained pursuant to an agency policy of photocopying the examinations of students who had failed.[6] Showe compared the photocopy to the original that had been forwarded to him, and observed a number of discrepancies. Although the photocopy indicated incorrect answers to questions 4 and 11, the original showed correct answers to these questions. In addition, red check marks, apparently indicating correct answers, had been placed beside the answers on the original. These marks did not appear on the photocopy. Because of the potential mis-

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[5] (Continued)
tions had been returned to Riden. R. IV at 283-84. Little testified, however, that he was not informed until February 12. R. III at 142. In addition, both Little and Showe testified that during a conversation they had on February 9 regarding Riden's unsatisfactory performance in the training course, no mention was made of any alleged grading error. R. III at 59-60, 116.

[6] John Le Doux, Chief of the Career Management Branch at the Inspection Personnel Office of the NRC, testified that the photocopy of Riden's CRO examination was made pursuant to an agency policy of reproducing the examinations of students who had failed either the examination or the entire training course. R. IV at 231-32. Showe testified, however, that the photocopy of Riden's test was made "quite by accident." R. III at 63-64. According to him, only examinations with failing grades were photocopied, but in the instant case the CRO examination was reproduced inadvertently when the two accompanying examinations (which Riden had failed) were photocopied. In either case, the photocopy of Riden's CRO examination was the product, even if an unwitting one, of the agency's photocopy policy.

conduct suggested by these differences, Showe informed his superiors of the discrepancies, and an investigation by the NRC's Office of Inspector and Auditor ("OIA") was commenced.

As part of its investigation, the OIA submitted the original and photocopy of Riden's CRO examination to the FBI for a analysis to determine the identity of the person responsible for altering the examination. The FBI concluded that Riden was the author of the original pencilled document, that the red check marks beside questions 4 and 11 on the original had been made with different ink than that used on the remainder of the test, and that erasures had been made on the original almost exactly over the areas on which the original and photocopy disagreed. The FBI was unable to determine definitively whether Riden had written the incorrect answers to questions 4 and 11 located on the photocopy, due to the small writing sample involved. It noted, however, that there were significant similarities between those answers and Riden's handwriting.

Following completion of the OLA investigation, Robert H. Heishman, Chief of the Reactor Operations and Nuclear Support Branch, Division III, concluded in a notice of proposed agency action that Riden had altered the answers to questions 4 and 11 on the original copy of the CRO examination, warranting his removal from the service. As provided by statute, Riden was afforded an opportunity to answer the charge against him in an oral reply hearing before James G. Keppler, the NRC Regional Director. Keppler reviewed the evidence, found the charge to be substantiated, and ordered Riden to be dismissed. This decision was affirmed by the Board after an evidentiary hearing.

II.

Riden's first contention is that he was denied due process when the hearing officer at the oral reply, Keppler, considered reasons for dismissing Riden beyond those

specified in the notice of proposed action. When a non-probationary employee, such as Riden, is sought to be dismissed from the service, he is entitled to "advance written notice . . . stating the specific reasons for the proposed action," 5 U.S.C. § 7513(b)(1) (Supp. III 1979), and the agency in arriving at its decision may consider "only the reasons specified in the notice of proposed action," 5 C.F.R. § 752.203(e)(1980). In the instant case, the notice of proposed action alleged that Riden had altered the results of the training examination. Riden argues, however, that Keppler considered a prior disciplinary matter involving Riden. This prior incident consisted of a charge that Riden had removed certain examination questions from agency files in July 1978. At that time, a letter of admonition, written by Keppler, was placed in Riden's personnel file, although no formal disciplinary action was taken. Riden has denied this charge and insists that this incident may not be relied on or considered in the instant proceeding because the agency never informed him of his right to contest the charge by means of a grievance.

We find no merit in Riden's argument that the hearing officer improperly considered the prior incident. It appears that reference to the incident was made in three documents antedating the oral reply hearing: (1) a memorandum written by Showe recommending formal action in the instant case, R. I at 141-42; R. II at 300-01; (2) a memorandum summarizing an interview with Showe conducted by the OIA, R. I at 78; and (3) a memorandum, dated March 19, 1979, written by Riden and addressed to Keppler, R. I at 28. All of these documents were contained in the written record reviewed by Keppler.[7] At the

[7] Because references to the prior incident other than those initiated by Riden were contained in the written record transmitted to Keppler for review, we must reject the NRC's argument that Riden himself first interjected the incident in his comments at the start of the oral reply.

outset of the hearing, Riden raised the issue of the relevance of the prior incident and stated his contention that the matter could not be relied on or considered by Keppler.[8] Keppler acknowledged Riden's position. No other reference to this prior incident appears in the record. We conclude that these facts are insufficient to show that Keppler actually considered or relied on the incident in making his decision.

Riden's reliance on *Albert* v. *Chafee*, 571 F.2d 1063 (9th Cir. 1978) (per curiam) is unavailing. In that case, the court held that a dismissed employee's due process rights were violated when the hearing examiner made specific findings of fact on matters not specified in the notice of proposed action and cited these unspecified matters in a way that appeared to justify the dismissal order. In the instant case, in contrast, the unspecified matters were simply mentioned in the written record reviewed by the hearing officer. They were not cited by him in a dispositive manner nor were they the subject of specific findings of fact. Absent evidence that the hearing officer actually relied on or considered matters not specified in the notice of proposed action, we cannot conclude that Riden was deprived of his right to due process of law.

Additionally, we observe that the purpose of the statutory and regulatory notice requirements is to ensure that an employee is afforded advance notice of the charges against, him, so that he may adequately prepare a defense. In the instant case, Riden's raising of the issue in his memorandum to Keppler and at the very outset of the hearing belies any claim that he was without actual notice that the prior incident might be considered. Thus, any error would have been harmless.

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[8] We thus disagree with the NRC's contention that Riden waived the issue by not appealing it. Riden's notice of appeal to the Board stated as its grounds all issues that had been raised during the oral reply. Having addressed the issue of the prior incident in his opening remarks to Keppler, Riden preserved the issue on appeal.

III.

Pursuant to 5 U.S.C. § 7513(b)(2) (Supp. III 1979) and 5 C.F.R. § 752.404(c)(1980), Riden was afforded an opportunity to make an oral answer to the proposed adverse action against him. He now contends that he was not given an adequate opportunity for an oral reply, and that therefore his due process rights were violated, because the hearing officer was not impartial and also because the hearing officer did not consider the oral reply in making his decision to remove Riden.

First, Riden maintains that Keppler's knowledge of and involvement in a prior disciplinary matter involving Riden (discussed in Part II, *supra*) disqualified Keppler as an impartial hearing officer. Whatever Riden's right to a hearing before an impartial agency official, we do not agree that Keppler's involvement in this earlier incident rendered him incompetent. Keppler simply presided over and adjudicated a wholly separate disciplinary charge that, we have noted, was in no way relied on or considered in reaching the decision to dismiss Riden for altering the training examination.

The cases cited to us in support of Riden's claim of bias are inapposite. Justice White's separate opinion in *Arnett* v. *Kennedy*, 416 U.S. 134, 196-99 (1974), suggested that an agency official would not be competent to preside over a hearing when he was personally involved in the situation giving rise to the disciplinary action. In the instant case, however, there is no suggestion that Keppler was involved personally in the alleged alteration of the training examination by Riden. Keppler's involvement in an unrelated disciplinary matter is irrelevant. Nor does Riden's reliance on *Ricucci* v. *United States*, 425 F.2d 1252 (Ct. Cl. 1970) support his claim. In that case, the court held that the purpose of the oral reply ("a general give and take discussion of the case," 425 F.2d at 1254-55) was defeated when the designated hearing officer was an investigator "professionally trained to disclose nothing," 425 F.2d at 1256. In the instant case,

Keppler's training and his position within the agency in no sense inhibited a give and take discussion of the charge against Riden and, moreover, the transcript of the oral reply hearing demonstrates that an active discussion in fact occurred.

Second, Riden asserts that Keppler failed to consider the oral reply. His assertion is based on a statement made by Keppler during the oral reply that much of Riden's presentation was "irrelevant."[9] This statement is insufficient to establish that Keppler did not consider the oral reply, for in the very next sentence, Keppler added, "Now, I'm going to consider what you've [Riden] said. I'm going to study the recording of this matter—." R. I at 248. Moreover, Keppler testified before the Board that despite the poor choice of words he had made in referring to Riden's presentation, he fully considered all of the evidence presented at the oral reply before reaching his decision. R. IV at 200.[10] We are unable to disagree with this assessment, and therefore conclude that Keppler's statement was not sufficient to reduce the oral reply to a "futile ritual." *Ricucci*, 425 F.2d at 1254.

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[9] Specifically, Keppler stated that he understood Riden's central contentions to be that he did not falsify the answers to the training examination and that the photocopy was not genuine. The other issues raised by Riden, Keppler added, were "really irrelevant to the matter." R. I at 248.

[10] We note, however, that Keppler's testimony that he reviewed all of the evidence cannot be interpreted to refer to the discussion at the oral reply regarding a prior disciplinary incident involving Riden. As we observed in Part II, *supra*, there is no evidence that Keppler specifically relied on this incident in reaching his decision to dismiss Riden. Moreover, Keppler's testimony to the Board included a detailed list of the evidentiary matters that he considered; none of the listed considerations related to the prior incident. R. IV at 200-01.

Riden next contends that we must set aside the Board's decision because it is "unsupported by substantial evidence." 5 U.S.C. § 7703(c)(3) (Supp. III 1979).[11] The evidence shows that there were discrepancies between the original copy of the CRO examination in Riden's possession and the photocopy retained by the NRC. Riden authored the original. The red check marks beside questions 4 and 11 on the original, apparently indicating correct answers, were written with different ink than that used on the rest of the test.[12] There were erasures on the original located precisely in those places in which the photocopy indicated erroneous answers. Although the handwriting on questions 4 and 11 on the photocopy could not be attributed definitively to Riden, there were significant similarities between these answers and Riden's writing. These facts, together with Riden's motive and op-

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[11] There appears to be some disagreement between the parties as to the proper standard of review in the instant case. The NRC relies on decisions of this court determining that agency dismissal orders will be upheld if there is a rational basis to support them. *Ringquist* v. *Hampton*, 582 F.2d 1138 (7th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979); *Young* v. *Hampton*, 568 F.2d 1253 (7th Cir. 1977). Riden points out, however, that these cases were decided before the effective date of § 7703(c)(3), which, as indicated, provides for reversal of agency decisions that are "unsupported by substantial evidence." For the purposes of this petition for review, we will assume that the substantial evidence standard applies. Because we hold that the Board's decision is supported by substantial evidence, *a fortiori* the more lenient rational basis standard is also satisfied.

[12] Although Showe (who graded Riden's examination) could not recall specifically whether he used one or two pens in grading the examination, he testified that it was his practice to use only one pen to grade an examination and that he could not remember ever having used more than one. R. III at 62. Thus, Riden's suggestion that the difference in the ink used to grade the test may be attributed to Showe's grading habits is unsupported.

portunity for falsifying the examination answers, provided substantial evidence, albeit of a circumstantial nature, supporting the Board's decision.[13]

Riden's defense throughout these proceedings has been that the photocopy, containing incorrect answers to questions 4 and 11, was falsified by some person within the agency in an attempt to "frame" Riden. No evidence in the record supports this contention. In the instant case, it was established that the photocopy of Riden's CRO examination was made in the course of carrying out the agency's policy of reproducing the examinations of failing students.[14] The photocopy that was made is from all appearances an exact replica of the original except for the discrepancies in questions 4 and 11. Under these circumstances, we do not think that the Board's failure to establish a wholly reliable and complete chain of custody for the photocopy is sufficient to overturn the Board's decision, absent some evidence that the photocopy was mishandled or doctored.

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[13] We also do not regard as significant the fact that Showe in the case of questions 4 and 11 failed to follow his usual practice of writing in the correct answers beside the incorrect responses given by the student. Several explanations for the omission were offered during the Board hearing. Le Doux testified that correct answers were not indicated on the examination because Riden's answers to questions 4 and 11 were neither correct nor incorrect but were merely nonresponsive. R. IV at 232. For his own part, Showe stated that he had simply "messed up" in neglecting to write in the correct answers to questions 4 and 11. R. III at 88-89. This testimony, considered in light of the other circumstances present in the instant case, provides no basis for accepting Riden's suggestion that the failure to observe the standard grading practice indicates that Riden's original answers were in fact correct.

[14] See *supra* note 6.

V.

Riden's final argument is that, assuming that the evidence was sufficient to establish his guilt, the penalty of dismissal was "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion by the agency." *Power* v. *United States,* 531 F.2d 505, 507 (Ct. Cl. 1976). *See also Rotolo* v. *Merit Systems Protection Board,* 636 F.2d 6 (1st Cir. 1980). Specifically, Riden characterizes the falsification of the CRO examination as a single incident of trivial consequences, and points to his otherwise unblemished employment and personal background.

We must disagree with Riden's claim that the agency abused its discretion in concluding that dismissal was justified in order to promote the efficiency of the service. Riden was found to have intentionally falsified the results of a training examination for the purpose of personal advancement. He occupied a position (and was slated for promotion to another position) that required personal integrity and maintenance of independence from the operators of the nuclear reactor facilities it was his duty to regulate. The NRC in its discretion could reasonably have concluded that it could no longer rely on the judgment of a reactor inspector who had falsified a promotional examination, and that failure to demand such an employee's removal could substantially diminish the public credibility of the agency's regulatory program. Accordingly, we conclude that the NRC's decision to remove Riden from the service was not an abuse of discretion.

VI.

For the foregoing reasons, we affirm the decision of the Board.

AFFIRMED.

APPENDIX B

UNITED STATES OF AMERICA

BEFORE THE MERIT SYSTEMS
PROTECTION BOARD
CHICAGO FIELD OFFICE

IN THE MATTER OF:
David M. Riden

v.

United States Nuclear Regulatory Commission

Decision Number: CH075209084

Date: February 26, 1980

INTRODUCTION

By petition filed November 15, 1979, the appellant appealed an action removing him on October 30, 1979, from the position of Reactor Inspector with the Nuclear Regulatory Commission, Office of Inspection and Enforcement, Region III. Glen Ellyn, Illinois.

JURISDICTION

The appeal is governed by the provisions of the Civil Service Reform Act of 1978 (the Reform Act). See Public Law 95-454, §§ 902(b), 907 (92 Stat. 1224, 1227). The Reform Act provides at 5 U.S.C. § 7513(d) that the removal of an employee is an action which is appealable to the Board under 5 U.S.C § 7701. Since the appellant, a preference eligible who had completed one year of current continuous service in an excepted service position at the time of his removal, meets the statutory definition of an "employee" as provided in the Reform Act at U.S.C. § 7511(a)(1)(B), I find that he has a statutory right of appeal to the Board from the removal action. In addition to a statutory right of appeal,

the appellant also has a regulatory right of appeal under the Office of Personnel Management regulations implementing the above statutory provisions. See 44 Fed. Reg. 47033 (1979) (to be codified in 5 C.F.R. § 752.401(b)(2) and 5 U.S.C. § 7514.

ANALYSIS AND FINDINGS

The basis for the appellant's removal was that he allegedly altered a training examination. The specification in support of this charge states that on September 22, 1978, the appellant took a training examination entitled "Plant Operational Status Evaluation" while a student at the PWR Technology Training Course taught at the TVA Training Facility at Chattanooga, Tennessee. The appellant was subsequently notified that he did not obtain a passing grade for the PWR Technology Training Course, and he was provided with the original copies of the above exam and two other exams included in the course. Following his receipt of these exams, he advised his supervisor, Mr. William Little, that he should have received a higher grade on the "Plant Operational Status Evaluation" exam. The original copy of this examination was then forwarded to Mr. Steven K. Showe, Chief, PWR Technology Section. After comparing this exam with a copy of the same examination that he had retained in his files, Mr. Showe determined that several specific changes had been made, which would have resulted in the appellant receiving a higher grade on the exam. Following an FBI investigation of these changes, the agency concluded that the appellant was responsible for altering the exam in an attempt to receive a higher grade on it.

Before adjudicating the merits of the above charge, I will discuss a procedural issue which has been raised by the appellant on appeal. The appellant asserts that the agency official who made the determination to remove him failed to consider all the information that was presented in his reply to the notice proposing his removal. The appellant bases this conclusion on the deciding official's statement at the oral reply that some of the appel-

lant's reply was "irrelevant," and that he, as the deciding official, was only going to consider "relevant" arguments. The official in question, Mr. James Keppler, Director, Region III, testified at the hearing that he considered some of the evidence that the appellant had presented at his oral reply to be irrelevant to the issue of whether he had altered the examination. He admitted, however, that he used a "poor choice of words" at the oral reply when he stated that a portion of the evidence would not be considered, and he stated that he reviewed and considered all of the material in the file as well as the appellant's reply in reaching his decision.

The Reform Act does not state what consideration must be given to an employee's reply to a proposed adverse action notice. It only provides at 5 U.S.C. § 7513(b) (2) and (4) that the employee is entitled to make a reply to the proposed action and receive a decision in his case. The Office of Personnel Management regulations pertaining to adverse actions state that the employee's reply must be considered in any decision reached by the agency. See. 5 C.F.R. § 752.404(f).

After a consideration of the evidence pertaining to this allegation, I am unable to find any violation of law, rule, or regulation as a result of Mr. Keppler's admission at the oral reply conference that he would only consider "relevant" information in determining whether the charge was sustained. Although Mr. Keppler admitted to a poor choice of words, he testified that he did read the appellant's entire reply, that he "understood (the appellant's) basic position," and that he reviewed and considered all of the evidence before he made his decision. In view of this evidence, I find that the appellant's reply was properly considered by the agency in reaching its removal determination.

With respect to the merits of the current charge, Section II of the agency's internal regulatory manual (the "NRC/IE Manual") specifies that all reactor inspectors

are required to pass certain specified training courses. The PWR Technology Training Course was included by the agency as a part of this training program, and the appellant was therefore required to pass this course in order to assume a permanent position as a resident inspector of reactors. This PWR course was comprised of three examinations, with the final score consisting of a weighed average of the three tests and 70 being a passing grade. In the event that a student was unable to pass the course, he could be retained and retested.

In the instant case, the documentary record reveals that the appellant scored 60 on the first exam and 64 on the second exam. In view of the nature of the testing, it would have been necessary for the appellant to have scored significantly above 70 on the final exam in order to have raised his entire average to 70.

Mr. Showe testified that the appellant only scored 75 (9 out of 12 correct answers) on the final test, which was not sufficient to raise his total score to a passing level. Mr. Showe also stated that he had retained a copy of the appellant's original examination with his records.

On February 1, 1979, the appellant received the original copies of the examinations given in the course along with notification by the Training Center that he had failed to pass the course. Upon review of the Plant Operations Status Evaluation exam, the appellant thought that he should have been credited with 11 correct answers, not 9. In view of this discrepancy, the appellant testified that on that same day (February 1) he took the examination to his supervisor, Mr. Little, and advised him that the test had been improperly graded.

Mr. Little testified that the appellant brought this error to his attention for the first time on February 12, 1979. After listening to the appellant, Mr. Little agreed to call the training division to find out more about the situation, and on February 14, 1979, he called Mr. Showe. He then made one copy of the examination the appellant

had given him, and he sent the original to Mr. Showe. As already noted, Mr. Showe then determined that there were differences between his copy of the exam and the one forwarded by Mr. Little, and an FBI investigation was initiated.

The two exams were introduced into the record at the hearing. The original examination, returned to Mr. Showe by Mr. Little (identified in the record as NRC Exhibit 13 and hereinafter referred to as "test 13"), differs from the copy of the exam retained by Mr. Showe (identified as NRC Exhibit 14 and referred to as "test 14") in several ways. For one, an incorrect answer under item 4 in test 14 was erased and the correct answer, with a correct accompanying explanation, was added in test 13. In addition, a check mark was added on test 13 to indicate that the item under discussion in item 4 was a technical item and another check mark was added which indicated that the appellant's answer had been graded as correct. Under item 11 of the test, one incorrect identification of a problem in test 14 was erased and replaced with a correct identification in test 13. Finally, a correct word of explanation was added under item 11 in test 13 and a check mark was added to indicate that the answer had been properly graded as correct. Mr. Showe stated that test 14 was properly graded as 9/12 correct, but that with the changes that had been made, test 13 should have been graded as 11/12 correct.

The FBI analysis of the two tests found that the additional writing on test 13 was that of the appellant, that the additional check marks made on tent 13 were made with different ink than the check marks on the rest of the test, and that erasures had been made almost exactly over the areas which would have been necessary to delete those items referenced in test 14. The FBI analysis was unable, in view of the small writing sample, to determine whether the writing which had been erased from test 14 was that of the appellant. It could only

state that there were "significant similiarities" between that writing and the appellant's writing.

The appellant testified at the hearing that test 13 was the one that he turned in when he originally took the test. He was unable to identify any individual who might have altered his test, but he stated that test 14 was a "falsified document."

In reviewing the above evidence, I note first that test 14 was a copy of the examination which had been kept by Mr. Showe. In view of the lack of any evidence showing that this document had been altered, the existence of this copy (test 14) is clear and direct evidence that test 13, not test 14, was a "falsified document." The circumstantial evidence concerning these tests also would indicate that test 13 was a document that had been altered by the appellant. In this respect, the FBI analysis demonstrated that the check marks on items 4 and 11 of test 13 had been made with different ink than the ink used in the check marks which appeared on the rest of the test. It would have been highly unlikely for Mr. Showe, who graded the test, to have used different pens in grading items 4 and 11 of the test, and Mr. Showe testified, in that respect, that it was not his practice to change pens while grading such examinations. In addition, the FBI analysis of test 13 strongly indicates, by the erasures which had been made, that the writings appearing on items 4 and 11 of test 14 had been erased and written over. Since the length of those erasures corresponded almost exactly to that necessary to eliminate the referenced incorrect writings in test 14, it can only be assumed that the appellant erased those items and wrote over them. It is also coincidental that the appellant would have written additional words under item 4 of test 13, when he admitted that the additional words did not relate with either of the other answers in 4 or 5 and when a review of the test reveals that there was more space elsewhere to have put the additional words.

In addition to the above evidence, the record shows that the appellant had both the motive and the opportunity to alter the exam. He had the opportunity since he had reecived the original test before pointing out the alleged errors to Mr. Little, whether he advised Mr. Little of this situation on February 1, as he testified, or on February 12, as Mr. Little testified. He had a motive for altering the test since he testified that he believed at the time he explained the problem to Mr. Little that he might have passed the course if he was given additional credit on the test.

After a review of the entire record, I find that a preponderance of the evidence supports the charge, and it is sustained.

In view of the seriousness of the sustained charge and evidence introduced at the hearing showing that the permanent position which would have been occupied by the appellant required a very high degree of personal integrity, I find that the agency's action was for such cause as will promote the efficiency of the service.

DECISION

The action is affirmed.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on APR 1, 1980 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to this appeal or the Director of the Office of Personnel Management may file a petition for review of this decision with the Merit Systems Protection Board. The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable law, rule or regulations.

The petition for review must be filed with the Secretary to the Merit Systems Protection Board, Washington, D.C., 20419, no later than thirty-five (35) calendar days

after the issuance of the initial decision, cite the basis for the exception, and refer to applicable law, rule, or regulations.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Under 5 U.S.C. § 7703(b)(1) the appellant may petition the United States court of appeals for the appropriate circuit or the United States Court of Claims to review any final decision of the Board provided the petition is filed no more than thirty (30) calendar days after receipt. For the Board:

/s/ Stephen E. Manrose
Stephen E. Manrose
Presiding Official

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

M. DAVID RIDEN

v.

NUCLEAR REGULATORY COMMISSION

Decision Number:
CH 075209084

ORDER

The Board, having fully considered appellant's petition for review of the initial decision issued on February 26, 1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

FOR THE BOARD:

/s/ Robert E. Taylor
Robert E. Taylor
Secretary

November 20, 1980
Washington, D.C.

APPENDIX D

UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION III
799 ROOSEVELT ROAD
GLEN ELLYN, ILLINOIS 60137

October 30, 1979

(Seal)

Mr. M. David Riden
Reactor Inspector
NRC Region III
Glen Ellyn, Illinois 60137

RE: Decision To Remove

Dear Mr. Riden:

By letter dated August 20, 1979, Mr. Robert F. Heishman notified you of a proposal to remove you from your position of Reactor Inspector, Region III, Office of Inspection & Enforcement (IE), U.S. Nuclear Regulatory Commission, Glen Ellyn, Illinois.

I have carefully and fully considered your oral answer of September 18, 1979 including a careful review of the verbatim transcript of that oral answer. I have also fully considered your memorandum to me of September 27, 1979. Based on this review, I find that the reason for proposing your removal—your action in altering a training examination as set forth in Mr. Heishman's August 20, 1979 letter—is sustained because it is fully supported by the evidence and warrants your removal to promote the efficiency of the service. Therefore, it is my decision that you be removed effective 4:45 p.m. today.

You have the right to appeal my decision within the Nuclear Regulatory Commission under the provisions Chapter 4156, "Appeals from Adverse Action," within fifteen (15) calendar days after you receive this decision. My decision, however, is not stayed, if you choose to file an appeal. The Appeal Officer is Victor Stello, Director, Office of Inspection and Enforcement, whose telephone number is (301) 492-7397, and his office is located in Room 322, East-West Towers Building, Bethesda, Maryland.

As a veteran preference employee, you have the right under 5 U.S.C. 7513(d) and 7701 to appeal this decision to the Merit System Protection Board (MSPB). If you choose to file an appeal with the MSPB, the petition for appeal must be filed during the period beginning with the day after the effective date of your removal and ending twenty (2000) calendar days after the effective date. (See Section 1201.22 of the MSPB's regulations.) The appeal should be addressed to Mr. R. J. Payne, Acting Chief Appeals Officer, Chicago Field Office, Merit Systems Protection Board, Federal Office Building—31st Floor, 230 South Dearborn Street, Chicago, Illinois 60604. As required by 5 C.F.R. 1201.21(b) and (c), I am enclosing a copy of the MSPB's regulations and a copy of a form entitled "Merit Systems Protection Board Appeals Form."

If you appeal this decision to the MSPB, no NRC appeal will be accepted, or will continue to be processed, under the procedures of NRC Chapter 4156 "Appeals from Adverse Actions." Moreover, my decision is not stayed by your filing of an appeal with the MSPB.

If you have any questions concerning your appeal rights and procedure, you may contact Mr. Carl Mohrwinkel

of the Division of Organization and Personnel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. Mr. Mohrwinkel's telephone number is (301) 492-8234.

Sincerely your,

/s/ James G. Keppler
James G. Keppler, Director
Region III
Inspection & Enforcement

Enclosure:
As stated

cn w/o encl:
G. Lacey, NTEU Assistant Counsel
F. Maura, Reion III NTEU Steward
V. Stello, Director, IE
C. Mohrwinkel, LMERB
D. Dambly, ELD

APPENDIX E

Unpublished Per Curiam Order

JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 8, 1982

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Robert A. Grant, Senior District Judge*

No. 80-2793

DAVID RIDEN,

Petitioner,

vs.

UNITED STATES NUCLEAR REGULATORY COMMISSION,

Respondent.

On petition for Review of an Order of the United States Merit Systems Protection Board.

This cause came on to be heard on the record from the United States Merit Systems Protection Board, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the decision of the United States Merit Systems Protection Board is hereby AFFIRMED, with costs, in accordance with the order of this court entered this date.

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.